Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No. 77-1090

FOUNDING CHURCH OF SCIENTOLOGY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

APPENDIX FOR THE PETITIONER

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APPENDIX A

[Filed Dec 1 1977]

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 77-1793 September Term, 1977

In Re: Miscellaneous #77-0151

Search Warrant Dated July 4, 1977,
for Premises at 2125 S Street,
Northwest, Washington, D.C.

BEFORE: MacKinnon and Robb, Circuit Judges; Markey, Chief Judge, US Court of Customs and Patent Appeals*

JUDGMENT

This cause came to be heard on the record on appeal from the order of the United States District Court for the District of Columbia and was argued by counsel. On consideration of the foregoing, for reasons which appear in the attached *per curiam* opinion, it appears to the Court that the warrant for the search of the premises at 2125 S Street, Northwest, Washington, D.C. dated July 4, 1977 is indistinguishable in practical effect from the warrant upheld by the Supreme Court in *Andresen v. Maryland,* 427 U.S. 463 (1976); that the warrant states with sufficient particularity the things to be seized; that Item 162 of this warrant does not render the warrant a general warrant within the meaning of the Fourth

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*Sitting by designation pursuant to Title 28 U.S.C. §293(a).

Amendment; and that the warrant does not leave to the executing officers impermissible discretion; it is therefore

ORDERED by this Court that the July 27, 1977 decision of the United States District Court for the District of Columbia that the warrant in this case is a general warrant in contravention of the Fourth Amendment and therefore invalid is reversed; and, it is

FURTHER ORDERED by the Court that the July 27, 1977 order of the District Court is vacated in its entirety; and, it is

FURTHER ORDERED by the Court that the case is remanded to the District Court for consideration of the other grounds alleged for invalidating the warrant not considered by the District Court, specifically, that the search was conducted in a manner that constituted a violation of the Fourth Amendment, that the agents employed unnecessary force in violation of 18 U.S.C. §3109; and that the warrant was stale.

Per Curiam

For The Court:

/s/ George A. Fisher
GEORGE A. FISHER
Clerk

Date: December 1, 1977
Opinion for the Court Per Curiam

[Will be printed at a later date]

[Filed DEC 1 1977]

UNITED STATES COURT OF APPEALS
for the District of Columbia Circuit

No. 77-1793

IN RE:
SEARCH WARRANT DATED July 4, 1977,
for Premises at 2125 S Street, Northwest
Washington, D.C.

Appeal from the United States District Court
for the District of Columbia
(D.C. Misc. 77-0151)

Argued November 18, 1977

Decided December 1, 1977

Hamilton P. Fox, III, Attorney, Department of Justice with whom *Earl J. Silbert,* United States Attorney, *Carl S. Rauh,* Principal Assistant United States Attorney, *Henry F. Schuelke, III,* Executive Assistant United States Attorney, *John A. Terry, Brian Shaughnessy, Raymond Banoun* and *Judith Hetherton,* Assistant United States Attorneys were on the brief, for appellants.

Philip J. Hirschkop, with whom *John D. Grad* and *Earl Dudley* were on the brief, for appellee.

Before: MacKINNON and ROBB, *Circuit Judges,* and MARKEY,* Chief Judge, United States Court of Customs and Patent Appeals

Opinion for the Court *Per Curiam*

PER CURIAM: Following a search and seizure by the Government of numerous documents pursuant to a search warrant, on motions of the Church of Scientology the trial court granted (1) a protective order against the use by the Government of certain of the documents in certain civil litigation between the parties, and (2) ordered the return of the property seized. The latter order which directed the return of the seized property was construed by the court to involve "[i]n effect . . . a motion to suppress" (Appellant's Appendix, 5) and on that basis the Government has appealed therefrom under 18 U.S.C. §3731.[1] The

*Sitting by designation pursuant to Title 28 U.S.C. §293(a).

[1] 18 U.S.C. §3731 provides:

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An appeal by the United States shall lie to a court of appeals from a decision or order of a district courts suppressing or excluding evidence or requiring the return of seized property in a criminal proceding, [sic] not made after the defendant has been put in jeopardy and before the verdict or finding on an indictment or information, if the United States attorney certifies to the district court that the appeal is not taken for purpose of delay and that the evidence is a substantial proof of a fact material in the proceeding.

The appeal in all such cases shall be taken within thirty days after the decision, judgment or order has been rendered and shall be diligently prosecuted.

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The provisions of this section shall be liberally construed to effectuate its purposes.

statute directs such appeals to be diligently prosecuted and pending grand jury proceedings are being held in abeyance awaiting the decision on this appeal. Accordingly, we have expedited the argument on the appeal and our decision as well.

In our view of the controversy the validity of the order of the District Court directing the return of the seized property turns on a single issue, *i.e.*, whether the trial court was correct when it construed the search warrant to be a "general warrant" prohibited by the Constitution.

The principal issue in this case thus turns on whether the warrant is overbroad and constitutes a general warrant because of the reference to the crime of "conspiracy" as set forth in item 162 of the affidavit for the search warrant (App. 32-76), and in the search warrant (App. 22-31). The search warrant in designating the "concealed certain property" that the "Federal Bureau of Investigation" was "commanded to search . . . and seize" stated "(See attached Description of property)." The attachment entitled "*Description of Property*" consisted of 7-½ typewritten pages (App. 33-40) which very specifically described and designated a great many items to be seized if found on the designated premises. There were 162 separately enumerated items so described. In most instances each item referred to a document on a single subject specified by type, date, subject and other relevant data such as the author or addressee. A few items were stated more broadly, but generally none of the first 161 items, except item 155, is attacked for any alleged lack of specificity or particularity. The "Description" incorporated the extensive affidavit attached to the affidavit for the Search Warrant. It is item 162 that is the

principal subject of attack by the appellee and which furnished the principal basis for the ruling by the trial court. As set forth in the Search Warrant item 162 appears in the following context:

> . . . there is now being concealed certain property, namely
>
> (See attached Description of Property)

(App. 22).

DESCRIPTION OF PROPERTY

* * *

> 162. Any and all fruits, instrumentalities, and evidence (at this time unknown) of the crimes of conspiracy, obstruction of justice and theft of government porperty [*sic*] in violation of 18 U.S. Code §§371, 1503 and 641 *which facts recited in the accompanying affidavit make out.*

(App. 31, emphasis added).

The reference in the search warrant to the "accompanying affidavit" incorporated the 33-page "Affidavit in Support of Search Warrant" (App. 42-74) that was attached to the "Description of Property" (App. 33-41), all of which was appended to the regular "Affidavit for Search Warrant," Form A.O. 106 (Rev. Apr. 1973) (App. 12). The affidavit was executed by Robert Tittle, Special Agent, Federal Bureau of Investigation.

The trial court in its Memorandum construed item 162 and stated:

> I hold that the grant of authority [by 162] to the agents to search for and seize any evidence of conspiracies to steal government property and to obstruct justice amounted to a "general warrant" and therefore contravened the Fourth Amend-

> ment's guarantee against unreasonable searches and seizures. I am not persuaded that the Supreme Court's recent decision in *Andresen v. Maryland,* 427 U.S. 463 (1976), is to the contrary.

(App. 6).

In reaching such conclusion we find that the district court gave an overbroad construction to the search warrant, improperly interpreted the relevant offenses, ignored a significant part of item 162 and gave an unduly restrictive interpretation to the Supreme Court decision in *Andresen v. Maryland, supra.*

First, as to the overbroad construction of the search warrant. As stated in its holding, set forth above, the district court held that the search warrant granted "authority to the agents to search for and seize *any* evidence of conspiracies to steal government property and to obstruct justice . . . ." Such construction is patently incorrect. It ignores completely the following language which limits the breadth of item 162: "*. . . which facts recited in the accompanying affidavit make out.*" (App. 31, emphasis added). The recited facts and designations of property and offenses impose particular limits upon the search warrant and that was the purpose of the italicized statement. This, the trial court did not consider. Properly construed the warrant only authorizes a search and seizure of evidence of the particular conspiracies to steal government property and to obstruct justice that are described in the "accompanying affidavit."

Without exhaustively describing these conspiracies and offenses, and the relevant "fruits, instrumentalities and evidence" (App. 31, 40) thereof that are described and particularized in the "Description of Property" and the "accompanying affidavit," the conspiratorial and ob-

struction offenses that may be the subject of the authorized search and seizure, because they are designated and particularized in the affidavit and search warrant, are the following: (1) Conspiracy to steal government property from: (a) the office of the United States Attorney in the U.S. Court House, Washington, D.C., and more particularly from the office of "Assistant United States Attorney Nathan Dodell" (App. 41, 52); (b) the office of Staff Attorney Paul Figley, Department of Justice, Washington, D.C. (App. 41, 48, 50); (c) the Internal Revenue Service (identification cards) (App. 42) and possibly other documents; and (d) by unlawfully breaking and entering such offices and the offices of Interpol maintained in the U.S. Treasury Department in Washington, D.C. (App. 49). (2) Conspiracy to obstruct justice: (a) by illegally obtaining from opposing parties in litigation "documents relating to Scientology-instituted Freedom of Information Act suits against, *inter alia,* the Central Intelligence Agency, the Drug Enforcement Administration, [the U.S.] Customs [Service], Interpol and the Defense Communications Agency" (App. 50); (b) by engaging in illegal eavesdropping (App. 46); (c) by perjury and subornation of perjury committed, *inter alia,* by Henning Heldt, Greg Willardson, Duke Snider, Michael James Meisner, Richard Weigand, Gerald Bennett Wolfe (App. 57-61) and others;[2] most of whom occupy managerial positions with the Church of Scientology in Washington, D.C. and Los Angeles, California (App. 75, 76).

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[2]Anyone who aids, abets, counsels, commands, induces, procures or wilfully causes another to commit an offense in violation of any U.S. statute is guilty as a principal of the crime so committed. 18 U.S.C. §2.

The allegations referred to above, in connection with the *conspiracy* offenses, also include allegations of facts which particularize the specific *substantive* offenses of theft of government property (18 U.S.C. §641) and obstruction of justice (18 U.S.C. §1503).

In addition to all the foregoing a separate part of the affidavit for the search warrant, extending over 11 typewritten pages, is devoted to setting forth in particular detail the "*Nature and Location of Document Files Maintained by the Church of Scientology*" (App. 63-73). This part of the supporting affidavit names names, describes documents, gives dates, describes their contents, and indicates where in the organization's offices they might be found. It also describes their size, the titles under which they might be found in the files, the extent of the relevant files, the meaning of certain titles, such as "program files" (App. 64), "operations (files) (App. 64); "government special bank" (App. 64) and that "two file systems [are maintained] consisting of covertly and overtly obtained documents" (App. 64). Of particular importance is the particular reference to the "confidential file of the Deputy Guardian for Information (U.S.) [of the Church of Scientology]" which allegedly contains "reports written by the [U.S.] Central Intelligence Agency in South American (in particular Ecuador and Bolivia) concerning Interpol agents believed to be involved in drug dealings" (App. 65). Some of the documents which were particularized "included some programs directed against government agencies" (App. 65). The files and filing system at the office designated in the search warrant 2125 S Street N.W., Washington, D.C., was also described and particularized (App. 72).

A significant part of the affidavit also particularizes the stolen documents by specifying their source and the subject matter to which they relate:

SOURCE OF DOCUMENTS

Items 1-99 lists documents stolen (and copied), from the office of Assistant United States Attorney Nathan Dodell, United States Attorney's Office for the District of Columbia.

Items 100-148 lists documents stolen (and copied) from the office of Staff Attorney Paul Figley, Department of Justice, Washington, D.C.

Items 100-122 are documents relating to the case of *Church of Scientology of California v. United States Department of Justice,* CV 74-3550-F.

Items 123-127 are documents relating to the case of *Church of Scientology of California v. Kelly,* Civil Action 74-906.

Items 128-130 are documents relating to the case of *Church of Scientology of California v. Postal Service,* Civil Action 75-2004-R.

Items 131-132 are documents relating to the case of *Church of Scientology of California v. State Department,* Civil Action 75-2832 AAH

Items 133-134 are documents relating to the case of *Church of Scientology of California v. Alcohol, Tobacco and Firearms,* Civil Action 75-1699 RFP.

Items 135-136 are documents relating to the case of *Church of Scientology of California v. Department of State,* Civil Action 75-2562E.

Item 137 is a document relating to the case of *Church of Scientology of California v. Department of Transportation,* Civil Action No. 75-3482.

Items 138-147 are documents relating to the case of *Church of Scientology of California v. Energy Research and Development Administration,* Civil Action No. 76-11R.

(App. 41).

The last paragraph of the affidavit makes further specific reference to "the crimes . . . which facts recited in the accompanying affidavit make out . . . ." (App. 40, 31).

> Based on the foregoing, affiant submits that there is probable cause to believe that, from 1974 through 1976, officials of the Church of Scientology in Los Angeles, California and in Washington, D.C., conspired to steal documents from the Government of the United States by means of the burglary of U.S. Government offices and theft by operatives of the Church in the employ of the U.S. Government; that documents belonging to the United States Government were stolen pursuant to that conspiracy; that copies of such stolen documents are secreted in the files of the Church of Scientology in Los Angeles, California, and Washington, D.C.; that subsequent to the confrontation between Messrs. Meisner and Wolfe and agents of the F.B.I. on June 11, 1976, officials of the Church of Scientology conspired to obstruct justice by preparing a false response to expected inquiries of Meisner and Wolfe by law enforcement authorities and federal grand juries; that plans, scenarios and directives were committed to writing in furtherance of this conspiracy; that such writings are secreted in the files of the Church of Scientology in Los Angeles, California, and Washington, D.C.; that the objects of this latter conspiracy were met in part before a Grand Jury of the United States District Court for the District

> of Columbia on June 10, 1977; that, thereafter a summary of Wolfe's Grand Jury testimony was prepared by him in furtherance of the objectives of this latter conspiracy; and that copies of that summary are secreted in the offices of the Church of Scientology in Los Angeles, California, and Washington, D.C. (Appellant's App. 73.)

It is apparent from the "Memorandum and Order" of the trial court that it interpreted the reference in the search warrant to "conspiracies" to refer to "conspiracies to steal government property and to obstruct justice" (Appellant's App. 6). We agree. However, we strongly disagree with the statement that the affidavit and search warrant were therefore general and not sufficiently particularized to pass constitutional muster. As outlined briefly above, the supporting documents went into great particularity not only as to the relevant documents and their location but also as to the particular offenses that the property sought was designed to prove. These offense are not "amorphous" – they are specific, particularized and according to the affidavit supported by reams of hard documentary evidence as well as by sworn statements of some of the alleged conspiractors and principals in the conspiracy and substantive offenses.

We agree with the District Court that the searches and seizures can only be conducted after a showing of

> . . . probable cause, supported by Oath or Affirmation, and particularly describing the place to be searched and the person or things to be seized.

U.S. Const. amend. IV. However, we agree with the finding of the United States Magistrate that the affidavit did show probable cause and described the "place to be search and the . . . things to be seized"

with the required particularity. The trial court Memorandum admits: "To be sure, the affidavit provided the agents with substantial guidance as to what to look for" (App. 17), but it gets off the track when it concludes: "For there is nothing 'particular' about conspiracy" (App. 15). In the context of *this* search warrant and the conspiracies it refers to this is an erroneous conclusion – the two conspiracies here specified were described in great particularity. *See* text, *supra.* We thus do not agree with the further findings of the trial court that the warrant "[permitted] seizure of anything at all" (App. 17), and "invited the agents to seize any document in the Church's files that struck their fancy" (App. 9).

The trial court also finds the warrant to be overbroad because:

> As a practical matter [it constitutes] . . . a directive to seize "evidence at this time unknown" of conspiracy [which amounts to] . . . a "wild card" permitting seizure of anything at all.

(App. 17). This, however, is an overbroad interpretation of the warrant. The warrant, in item 162, only authorizes

> Any and all fruits, instrumentalities, and evidence (at this time unknown) of the crimes of conspiracy, obstruction and theft of government property . . . *which facts recited in the accompanying affidavit make out.*

(App. 31). Thus, as pointed out in the forepart of this opinion, the italicized language imposes a very great degree of particularity and specificity to all the offenses described and to the evidence, fruits and instrumentalities that may be seized. But the important feature about the questioned language in item 162 is that it

follows identically the language which the Supreme Court in *Andresen v. Maryland, supra* found was not overbroad in the context of the offenses there designated. Precisely, *Andresen* holds that the warrant did not become "fatally general because it followed an exhaustive list of particularly described documents with the phrase 'together with other fruits, instrumentalities and evidence of crimes at this [time] unknown.' " 427 U.S. at 479.

A cursory comparison indicates that the questioned language here is more precise tha[n] that in *Andresen*, in that it is limited by the facts concerning the offenses which are made out by the recitations in the accompanying affidavit. Also, the offenses here described do not suffer in comparison with the offense concerning the crime of false pretenses surrounding "Lot 13T" that was involved in *Andresen*. In that decision the search was upheld for evidence of "intent to defraud and knowledge of [the] falsity" of the allegedly false representations. 427 U.S. at 483. The limitation of the present warrant to the designated crimes "which facts recited in the accompanying affidavit make out" is every bit if not more specific and particularized than the warrant in *Andresen*.

A further question is raised as to item 155. Item 156 should also probably be included. These items provide:

> 155. A Guardian Order generally identified as "Snow White".
>
> 156. Any and all Guardian Orders issued pursuant to the Guardian Order generally identified as "Snow White" which would be identified by the mention of "Snow White".

(App. 39). These may be referred to as the "Snow White" files. In connection therewith, on this appeal, the Church contended at oral argument:

> This warrant, if it's upheld by the court [on its Snow White items] authorized the FBI to seize all of the legal files of the Church of Scientology, all of its litigation files, all of its correspondence to counsel, all of its pleadings, all of its proposed pleadings, all of its records.

In this connection, the warrant should not be construed that broadly. While the warrant may have supported a claim to examine the "Snow White" file, just as a warrant to search a house for a murderer would not authorize seizing the contents of the house, the Government cannot retain "all the legal files of the Church of Scientology" but only those in the "Snow White" category that constitute the particularized "Guardian Orders", possibly including general orders in the "Snow White" phase of the Church's operations, and material in such files that constitute "fruits, instrumentalities and evidence . . . of the [stated] crimes . . . which facts recited in the accompanying affidavit make out." (App. 39-40).[3] If any of the

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[3]We have made a cursory examination of the material seized in Washington, D.C. Without going into any detail concerning such material we note it includes (1) apparently *original* documents from the Internal Revenue Service, (2) copies of Central Intelligence Agency documents marked "Secret", and (3) a file on "Bugging", and another on locksmithing, in addition to a great deal [of] other material.

We do not find any of the cases cited by counsel in his letter of November 16, 1977 to be contrary to the above holding. United States v. Katz, 238 F. Supp. 689, 695 (S.D.N.Y. 1965) ordered the return of an automobile that the government sought to forfeit and retain as evidence. The court found that no

[footnote continued]

documents seized in the search by the agents exceed the bounds of the search warrant they should be returned, but the "fruits, instrumentalities and evidence" that were seized, and that are relevant to the particularized offenses and which are specifically referred to in the affidavit and search warrant, should be delivered to the government forthwith for use in connection with the grand jury proceedings. Our order herein does not restrict the right of the court to consider and determine whether any specific document may have been seized outside the authority of the search warrant as construed in this opinion.

On the authority of *Andresen v. Maryland*, 427 U.S. 463, 478-484 (1976), we hold that the search warrant in this case is not a general warrant and is valid. The

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"evidentiary" reason had been shown for requiring the retention of the auto and that it had not supported its forfeiture claim. The court also denied the motion to suppress evidentiary use of other evidence seized in the search. This supports the conclusion we reach that some seized material may be retained while other material may not be retained. United States v. Bell, 120 F. Supp. 670 (D.D.C. 1954), also involved a forfeiture and was decided on procedural grounds. As for Neen v. United States, 386 F.2d 953, 956 (headnote 5) (10th Cir. 1967), and Goodman v. United States, 369 F.2d 166, 168 (9th Cir. 1966), neither are relevant to our disposition of the case. As for the citation to WRIGHT, FEDERAL PRACTICE AND PROCEDURE, CRIMINAL at 676, the citation is generally irrelevant, but it does point out that when a motion to suppress is granted, normally the "property must be returned" but not where the property is "otherwise subject to lawful detention." This would negate that part of the court's order that directed the return to the Church of stolen government property or material that had been improperly copied from government documents. Certainly such material is "subject to detention" by the Government.

order requiring the return of the property is thus vacated.[4]

Order accordingly.

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[4]The search warrant is clearly limited to a search for evidence relating to the crimes of theft of government property, obstruction of justice and a conspiracy to commit such crimes. There is nothing in the nature of the crime of conspiracy as proscribed by 18 U.S.C. §371 that prevents a magistrate from issuing a search warrant to seize evidence that such crime has been committed. In fact, conspiratorial crimes are conducted with more secrecy than many other crimes and search warrants that seek evidence of conspiracy, and otherwise meet the required standards, may extend to all relevant evidence of that crime. Otherwise, alleged conspirators would occupy a special protection from prosecution that is not available to other accused persons. The same may be said of search warrants seeking relevant evidence of obstruction of justice. Neither of these offenses possess any special immunity that would protect them from being ferreted out by proper search warrants seeking relevant evidence. While these offenses may have certain subjective elements, like the criminal intent in Andresen v. Maryland, *supra*, the evidence that proves such subjective elements may be objective, tangible and constitute clear proof. This appears to be a case where, if the documents described and particularized in the affidavit and search warrant, live up to their description, the crimes of conspiracy to steal government property and to obstruct justice and such substantive offenses, would be practically proved, amorphous intent and all, merely by introducing the documents themselves with testimony as to where they were found.

APPENDIX B

[Filed Dec 8, 1977]

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 77-1793

September Term, 1977

Misc. 77-0151

IN RE:

SEARCH WARRANT DATED July 4, 1977,
for Premises at 2125 S Street, Northwest
Washington, D.C.

Before: MacKINNON and ROBB, Circuit Judges, and MARKEY,* Chief Judge, United States Court of Customs and Patent Appeals

ORDER

It is ORDERED by the Court, *sua sponte*, that the opinion filed on December 1, 1977, is hereby amended as follows:

Page 12, line 22, of the opinion, after the word "file" and before the comma, insert:

"but not necessarily to seize its entire contents"

Per Curiam
For the Court:

/s/ George A. Fisher
George A. Fisher
Clerk

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*Sitting by designation pursuant to Title 28, U.S.C. §293(a).

APPENDIX C

[Filed Jan 9, 1978]

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 77-1793

September Term, 1977

Miscellaneous #77-0151

IN RE:

SEARCH WARRANT DATED July 4, 1977,
for Premises at 2125 S Street, Northwest
Washington, D.C.

BEFORE: MacKinnon and Robb, Circuit Judges; and Markey*, Chief Judge, U.S. Court of Customs and Patent Appeals.

ORDER

Upon consideration of the motion of the Founding Church of Scientology for leave to inspect documents and for other relief, of the government's opposition thereto and of movant's reply, and it being asserted that the first two sentences in footnote 3 of the opinion of this Court

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*Sitting by designation pursuant to Title 28 U.S.C. §293(a).

filed in this case on December 1, 1977 refer to some documents which are not indexed in the warrant return, it is

ORDERED by the Court that the Opinion for the Court, filed December 1, 1977, is hereby amended by the deletion of the first two sentences in footnote 3 thereof, on pages 12-13 of the printed slip opinion, for the reasons set forth in the attached memorandum of this Court filed herein this date, and it is

FURTHER ORDERED by the Court that the motion of the Founding Church of Scientology for leave to inspect documents and for other relief, is denied, in accordance with the attached memorandum of this Court, filed herein this date.

Per Curiam

For the Court:

/s/ George A. Fisher
GEORGE A. FISHER
Clerk

No. 77-1793

In re: Search Warrant Dated July 4, 1977, for Premises at 2125 S Street, Northwest, Washington, D.C.

MEMORANDUM

The Founding Church of Scientology has moved this court for leave to inspect the doc[u]ments obtained in a search conducted pursuant to the subject search warrant of July 4, 1977 for the premises at 2125 S Street, Northwest, Washington, D.C. These documents, which are contained in eight medium-sized paper boxes, are now in the possession of this court as part of the record in this case. Movant contends that the opinion of this court of December 1, 1977 referred in two sentences of footnote 3 to some documents which are not indexed in the warrant return; that these documents, which the opinion stated were "in addition to a great deal of other material," were referred to by the Government in its pleadings filed with the United States Supreme Court in opposition to the application of the Founding Church of Scientology to stay the mandate; that movant has filed a petition for rehearing and/or suggestion for appropriateness of rehearing *en banc* in this court; and that said documents will be in part a subject of further litigation. Insofar as said documents may be a subject of further litigation, the motion to inspect them should be addressed to and considered by the District Court on remand. Movant also asserts that, because of the two sentences of footnote 3, inspection of the documents referred to is necessary in order to enable it to further develop its defenses. However, the two sentences which were placed in footnote 3, that movant refers to, were not necessary to this court's decision and the decision of this court on December 1, 1977 was concerned solely with the facial validity of the search warrant inasmuch as the District Court "considered [movants] memoranda and oral arguments with respect to the warrants *facial validity*" and found the warrant to be "overbroad on its *face*." (Emphasis added.) With the decision of the District Court being thus based on the facial invalidity of the warrant the content of the documents seized is irrelevant to the case in its present posture. For the foregoing reasons the court, *sua sponte*, strikes the first two sentences of footnote 3 from its opinion. The motions to inspect said documents, and to direct the Government to deliver to the Church's counsel a copy of the documents held, are denied. The movant may renew its motions when the case is again before the District Court.

APPENDIX D

Notice: This opinion is subject to formal revision before publication in the Federal Reporter or U.S. App. D.C. Reports. Users are requested to notify the Clerk of any formal errors in order that corrections may be made before the bound volumes go to press.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 77-1793

IN RE: SEARCH WARRANT DATED JULY 4, 1977,
for Premises at 2125 S Street, Northwest
Washington, D.C.

Supplemental Opinions on Suggestion for Rehearing
En Banc

(D.C. Misc. 77-0151)

Filed January 4, 1978

BEFORE BAZELON, *Chief Judge*; WRIGHT, MCGOWAN, TAMM, LEVENTHAL, ROBINSON, MACKINNON, ROBB and WILKEY, *Circuit Judges*

ORDER

The suggestion for rehearing *en banc* filed by appellee Founding Church of Scientology, having been transmitted to the full Court and no Judge having requested a vote with respect thereto, it is

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

ORDERED by the Court *en banc* that appellee's aforesaid suggestion for rehearing *en banc* is denied.

Statement of *Circuit Judge* WRIGHT, in Which *Chief Judge* BAZELON and *Circuit Judge* LEVENTHAL Join, as to Why He Does not Request a Vote on the Suggestion for Rehearing *En Banc*, is attached.

Statement of *Circuit Judge* ROBINSON, with Whom *Circuit Judge* MCGOWAN Concurs, as to Why He Does Not Request a Vote on the Suggestion for Rehearing *En Banc*, is attached.

Statement of *Circuit Judge* WRIGHT, in Which *Chief Judge* BAZELON and *Circuit Judge* LEVENTHAL Join, as to Why He Does not Request a Vote on the Suggestion for Rehearing *En Banc*

WRIGHT, *Circuit Judge*: In its most recent case considering the constitutionality of a search warrant the Supreme Court stated:

> General warrants, of course, are prohibited by the Fourth Amendment. "[T]he problem [posed by the general warrant] is not that of intrusion *per se*, but of a general, exploratory rummaging in a person's belongings. . . . [The Fourth Amendment addresses the problem] by requiring a 'particular description' of the things to be seized." *Coolidge* v. *New Hampshire*, 403 U.S. 443, 467 (1971). This requirement "'makes general searches . . . impossible and prevents the seizure of one thing under a warrant describing another. *As to what is to be taken, nothing is left to the discretion of the officer executing the warrant.*'" *Stanford* v. *Texas*, 379 U.S. 476, 485 (1965), quoting *Marron* v. *United States*, 275 U.S., at 196.

Andresen v. Maryland, 427 U.S. 463, 480 (1976) (emphasis added). The search warrant which the panel of this court upheld in this case directed the seizure of

> [a]ny and all fruits, instrumentalities, and evidence (at this time unknown) of the crimes of conspiracy, obstruction of justice and theft of governmental [property] in violation of 18 U.S.C. §§ 371, 1503 and 641 which facts recited in the accompanying affidavit make out.

Appellant's Appendix at 40.

The panel here predicated its decision upholding the warrant squarely on the Supreme Court's opinion in *Andresen*. Thus the question presented in this case is whether "nothing [was] left to the discretion of the officer executing the warrant." Since it is clear that the parties will ask the Supreme Court to review whatever is decided at this level in this case, in the interest of reducing unnecessary delay in this litigation, I think the case should now be passed on to the Supreme Court.

Statement of *Circuit Judge* ROBINSON, with Whom *Circuit Judge* MCGOWAN Concurs, as to Why He Does Not Request a Vote on the Suggestion for Rehearing *En Banc*

ROBINSON, *Circuit Judge*: The warrant under scrutiny directed seizure of 161 designated items and of

> [a]ny and all fruits, instrumentalities, and evidence (at this time unknown) of the crimes of conspiracy, obstruction of justice and theft of governmental [property] in violation of 18 U.S.C. §§ 371, 1503 and 641 which facts recited in the accompanying affidavit make out.[1]

The District Court, denominating the latter call "a 'wild card' permitting seizure of anything at all,"[2] reasoned

[1] Appellant's Appendix 40, quoted in *In re Search Warrant Dated July 4, 1977*, No. 77-1793 (D.C. Cir. Dec. 1, 1977), at 4.

[2] *In re Search Warrant Dated July 4, 1977*, 436 F.Supp. 689, 698 (D.D.C. 1977).

that it communicated to executing officers permission to search for and seize anything arguably related to any and all violations of the three enumerated statutes[3] and thus was tantamount to an unconstitutional general warrant.[4] The panel, on the other hand, read the warrant as reasonably instructing officers to search only for evidence of seven specific criminal incidents alleged in the affidavit.[5] Thus construed, the warrant in the panel's view was adequately particularized, as judged by the standards of the Supreme Court's recent decision in *Andresen* v. *Maryland*.[6]

Whether the panel correctly appraised a prudent officer's understanding of the language of this warrant is

[3] *Id.* at 694, 697. See also *United States* v. *Burch*, 432 F. Supp. 961, 963 (D. Del. 1977). The District Court explained:

> The warrant in this case authorized—if indeed it did not direct—agents of the FBI to examine carefully and completely the contents of every document in the fourth-floor files of the Church and to make ad hoc, on-the-spot decisions as to which of those documents constitute evidence of conspiracy—an amorphous and open-ended crime that, as discussed below, has since its conceptual inception perplexed commentators and courts alike. In my view this warrant—addressed as it is to the crime of conspiracy—invited the agents to seize any documents in the Church's files that struck their fancy.

436 F.Supp. at 694.

[4] The Fourth Amendment provides in part that "no warrant shall issue" unless "particularly describing the place to be searched, and the person or things to be seized."

[5] *In re Search Warrant Dated July 4, 1977, supra* note 1, at 5-6. The panel concluded that the authorization in this warrant is nearly identical to that approved by the Supreme Court in *Andresen* v. *Maryland*, 427 U.S. 463, 96 S.Ct. 2737, 49 L.Ed.2d 627 (1976). *In re Search Warrant, supra* note 1, at 11. The District Court, however, felt that in context the challenged language, though similar, likely conveyed a different message. See note 3 *supra*.

[6] See note 5 *supra*.

surely not an issue rising to *en banc* caliber.[7] And though the panel's opinion is not entirely clear, I do not view it as a negation of the time-honored principle that the pivotal question is not whether a court in hindsight *can* find in the warrant a curb on the power to search but rather whether at the time of execution an officer reasonably and likely would take the warrant as authority for unbridled rummaging.[8] Nor is it argued that the magistrate reason-

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[7] See Fed. R. App. P. 35(a).

[8] *Andresen* v. *Maryland*, *supra* note 5, 427 U.S. at 493, 96 S.Ct. at 2754, 49 L.Ed.2d at 650 (Brennan J., dissenting); see *id.* at 480-481, 96 S.Ct. at 2748, 49 L.Ed.2d at 642 (majority opinion), quoting *Coolidge* v. *New Hampshire*, 403 U.S. 443, 467, 91 S.Ct. 2022, 2038, 29 L.Ed.2d 564, 583 (1971) (one of two main objectives of the Fourth Amendment warrant requirement is to assure that "searches deemed necessary should be as limited as possible," and the warrant achieves that goal only by directing executing officers to the particular things to be seized), and quoting also *Stanford* v. *Texas*, 379 U.S. 476, 485, 85 S.Ct. 506, 512, 13 L.Ed.2d 431, 437 (1965), in turn quoting *Marron* v. *United States*, 275 U.S. 192, 196, 48 S.Ct. 74, 76, 72 L.Ed. 231, 237 (1927) ("[t]he requirement that warrants shall particularly describe the things to be seized makes general searches under them impossible and prevents the seizure of one thing under a warrant describing another"; "[a]s to what is to be taken, nothing is left to the discretion of the officer executing the warrant"). See also *United States* v. *United States District Court (Keith)*, 407 U.S. 297, 316, 92 S.Ct. 2125, 2136, 32 L.Ed.2d 752, 765 (1972), quoting *Leach* v. *Three of King's Messengers*, 19 How.St.Tr. 1001, 1027 (1765) ("'[i]t is not fit," said Mansfield, 'that the receiving or judging of information should be left to the discretion of the officer. The magistrate ought to judge and should give certain directions to the officer.'").

Thus, it is not enough that the parameters the magistrate intends to place on the scope of the search would bring it within constitutional bounds. Nor is it enough that a reviewing court is able to read the warrant as not necessarily

ably could have defined the items subject to seizure with greater particularity and thus have "minimize[d] unwarranted intrusions upon privacy."[9] Therefore, because the panel opinion rests squarely upon its quasi-factual interpretation of the total context of this warrant, I think rehearing *en banc* would be unjustified. The mere inclusion in future warrants of language that in isolation is similar or identical to that under review in this case would not necessarily immunize those warrants from challenges that they authorized overbroad searches.

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chartering an impermissible search. The executing officers themselves must know at the outset how far they are licensed to go in their pursuit of evidence.

[9] *Andresen* v. *Maryland*, *supra* note 5, 427 U.S. at 482 n. 11, 96 S.Ct. at 2749 n.11, 49 L.Ed.2d at 643 n.11.

APPENDIX E

[Filed July 27, 1977]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Miscellaneous No.: 77-0151

In re:
Search Warrant Dated
July 4, 1977, for Premises
at 2125 S Street, Northwest,
Washington, D.C.

MEMORANDUM AND ORDER

On July 8, 1977, agents of the Federal Bureau of Investigation (FBI) executed a search warrant on the premises of the Founding Church of Scientology, Washington, D.C.[1] Issued on the strength of a lengthy affidavit alleging that certain Church officials had conspired "to steal documents from the Government of the United States by means of the burglary of U.S. Government offices and theft by operatives of the Church in the employ of the U.S. Government" and to obstruct justice by "preparing a false response to expected inquiries . . . by

[1] Another search was conducted the same day at the Church's offices in Los Angeles, California. I am concerned here only with the propriety of the search conducted in the District of Columbia.

law enforcement authorities and federal grand juries,"[2] the warrant directed the agents to file cabinets located in the rear of the fourth floor of the building that houses the Church's Washington offices. There, the affiant stated he had probable cause to believe, the agents would find copies of the stolen documents as well as written plans, scenarios, directives and a summary of grand jury testimony prepared in furtherance of the alleged conspiracies.

The warrant directed the agents to leave no stone unturned. It identifies 148 documents and files allegedly stolen from government offices. It also lists as appropriate for seizure the summary of grand jury testimony and 12 other documents and categories of documents that the government apparently believes constitute evidence of the alleged conspiracies. Finally, item number 162 of the warrant authorizes the agents to seize:

> Any and all fruits, instrumentalities and evidence (at this time unknown) of the crimes of conspiracy, obstruction of justice and theft of government porperty [sic] in violation of 18 U.S. Code §§371, 1503 and 641 which facts recited in the accompanying affidavit make out.

While the FBI agents were conducting the search the Church filed a motion in this Court seeking to restrain them from doing so and to impose a protective order sealing all documents seized, primarily on the ground that the warrant was overbroad on its face in violation of the Fourth Amendment to the United States Constitution. The Church argued in addition that should the contents of some of the seized documents be disclosed to representatives of the numerous federal agencies with which

[2] Affidavit in Support of Search Warrant at 32. The affidavit discusses these allegations in considerable detail.

it is presently involved in civil litigation, its attorney-client privilege would be violated and its litigation prospects irreparably damaged. This Court denied the motion without reaching the merits of the Church's contentions. On July 11 the Church renewed its request for a protective order; with the consent of the United States Attorneys responsible for the criminal investigation, an order was entered prohibiting disclosure of the seized materials to attorneys for or employees of agencies involved in civil litigation with the Church. The order was to remain in effect for ten days.

The Church has now moved for return of the property seized from its Washington files on July 8. Rule 41(e), Fed. R. Crim. P. In effect this is a motion to suppress. *Id.* The Church asserts four grounds for invalidating the seizure: The warrant was overbroad – or "general" – on its face; the agents conducted the search in a manner violative of the Fourth Amendment; the agents employed unnecessary force in violation of 18 U.S.C. § 3109; and any probable cause that might have been established by the affidavit had grown stale by the time it was executed.

Having considered the memoranda filed by representatives of the Church and of the government and heard their oral arguments with respect to the warrant's facial validity, I find I need go no further. I hold that the grant of authority to the agents to search for and seize any evidence of conspiracies to steal government property and to obstruct justice[3] amounted to a "general warrant" and therefore contravened the Fourth Amendment's

[3]It should be noted that item 162 of the warrant appears to permit seizure of evidence of *any* conspiracy. I reject such a construction, however, in light of the emphasis in the affidavit on the two types of conspiracies I have mentioned.

guarantee against unreasonable searches and seizures. I am not persuaded that the Supreme Court's recent decision in *Andresen v. Maryland*, 427 U.S. 163 (1976), is to the contrary.

I

The Fourth Amendment to the Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, *and particularly describing the place to be searched and the persons or things to be seized.* (Emphasis added.)

The Fourth Amendment serves to prevent both unjustified and arbitrary interferences with personal security and property.[4] In the first instance the amendment is designed to ensure that the government cannot interfere with a person's security unless it has a good reason for doing so. The *particularity* requirement ensures as well that the government cannot conduct a search indiscriminately, as by rummaging through a person's belongings in search of any evidence of any crime whatsoever. It accomplishes this end in two ways. First, it leaves to a neutral judicial officer the initial decision as to what can be seized.[5] Second, it circumscribes the permissible

[4]*See generally* Amsterdam, *Perspectives On the Fourth Amendment*, 58 Minn. L. Rev. 349, 410-12 (1974).

[5]The requirement that warrants shall particularly describe the things to be seized makes general searches under them impossible and prevents the seizure of one thing under a warrant describing another. As to what is to be taken, nothing is to be left to the discretion of the officer executing the warrant. *Marron v. United States*, 275 U.S. 192, 196 (1927).

bounds of the search itself; as a commonly-used example illustrates, an officer executing a warrant could not reasonably expect to find a stolen elephant in a kitchen closet or in the drawer of a desk.

As particularity is required, so necessarily is generality forbidden. Opposition to the so-called "general warrant" has firm roots in the history of Anglo-American law. As Justice Stewart has observed, writing for a majority of the Supreme Court in *Stanford v. Texas*, 379 U.S. 476, 481-82 (1965):

> These words [commanding a particularized description of the place to be searched and the persons or things to be seized] are precise and clear. They reflect the determination of those who wrote the Bill of Rights that the people of this new Nation should forever 'be secure in their persons, houses, papers, and effects' from intrusion and seizure by officers acting under the unbridled authority of a general warrant. Vivid in the memory of the newly independent Americans were those general warrants known as writs of assistance under which officers of the Crown had so bedeviled the colonists. The hated writs of assistance had given customs officials blanket authority to search where they pleased for goods imported in violation of the British tax laws. They were denounced by James Otis as 'the worst instrument of arbitrary power, the most destructive of English liberty, and the fundamental principles of law, that ever was found in an English law book,' because they placed 'the liberty of every man in the hands of every petty officer.' The historic occasion of that denunciation, in 1761 at Boston, has been characterized as "perhaps the most prominent event which inaugurated the resistance of the colonies to the oppressions of the mother country. 'Then and there,' said John Adams, 'then and there was the

> first scene of the first act of opposition to the arbitrary claims of Great Britain. Then and there the child of Independence was born.'" *Boyd v. United States*, 116 U.S. 616, 625 (1886).

Also it is significant, in considering the propriety of seizure of a Church's documents, that the First and Fourth Amendments share at least in part a common heritage.

> Historically the struggle for freedom of speech and press in England was bound up with the issue of the scope of the search and seizure power.

Marcus v. Search Warrants, 367 U.S. 717, 724 (1961). In fact, unlimited power to search was first directed at non-conforming religious groups.

> In Tudor England officers of the Crown were given roving commissions to search where they pleased in order to suppress and destroy the literature of dissent, both Catholic and Puritan.

Stanford v. Texas, supra, at 482.

I make reference to the First Amendment not to suggest that overtones of religious persecution attend the criminal investigation of the Church of Scientology, but to make clear the need for increased sensitivity in cases in which religious organizations are involved, irrespective of the nature or gravity of the charges against them. *Cf. Stanford v. Texas, supra; Marcus v. Search Warrants, supra.*

The flaw I find in the warrant involved here is precisely the evil that inheres in general warrants. The warrant in this case authorized – if indeed it did not direct – agents of the FBI to examine carefully and completely the contents of every document in the fourth-floor files of the Church and to make ad hoc, on-the-spot decisions as to which of those documents constitute evidence of con-

spiracy – an amorphous and open-ended crime that, as discussed below, has since its conceptual inception perplexed commentators and courts alike. In my view this warrant – addressed as it is to the crime of conspiracy – invited the agents to seize any documents in the Church's files that struck their fancy. As the Supreme Court put it in another context in *Marcus v. Search Warrants, supra:* "The warrants gave the broadest discretion to the executing officers; they left to the judgment of each of the many police officers involved the selection of such magazines as in his view constituted 'obscene publications.'" 367 U.S. at 732. In the present context as well, the sweep of that discretion is constitutionally intolerable.

II

The government rests its case, and quarrels with the analysis presented above, primarily on the authority of *Andresen v. Maryland,* 427 U.S. 463 (1976). In fact, as counsel for the government has indicated, the warrant involved in this case was patterned after the one at issue in *Andresen.* As I have suggested, I do not believe that *Andresen* stands for the proposition that a warrant authorizing search for evidence of particular conspiracies comports with the particularity requirement of the Fourth Amendment. Nevertheless, *Andresen* closely resembles the present case in numerous respects and obviously must be examined here.

Andresen can best be understood in the light of the Supreme Court's earlier opinion in *Warden v. Hayden,* 387 U.S. 294 (1967). In *Warden* a majority of the Court joined in abandoning the so-called "mere evidence" rule, which had prohibited seizure of items having only evidential value as distinguished from contraband, fruits and instrumentalities of crime. *Warden* involved a "hot pursuit," *warrantless* search that culminated in retrieval not only of a robbery suspect, weapons, and ammunition he allegedly used, but also of clothing he allegedly wore during the robbery, found in a washing machine in the basement of his house. The Court was hard put, on the facts of that case, to draw distinctions in terms of interests the Fourth Amendment is designed to protect between the clothing, on the one hand, and the weapons and ammunition, on the other. Chief Justice Warren and Justice Fortas concurred in the result only, expressing apprehension that abandonment of the "mere evidence" rule was not only unnecessary but also likely to destroy the Fourth Amendment's prohibition against general searches. 387 U.S. at 310-12. Justice Douglas dissented vigorously on essentially the same ground. *Id.* at 312-25[.]

At the time of the Court's decision in *Warden,* despite some ambiguity it was generally assumed that the *Fifth* Amendment stood as a bar to *seizure* of an individual's personal papers, as well as to compelled *production* of such papers. *E.g., Boyd v. United States,* 116 U.S. 616 (1886). *Warden,* however, expressly left open the question whether that was so. 387 U.S. at 303.

The Supreme Court apparently determined to resolve much of this ambiguity in *Andresen.* It upheld a conviction for the crime of "false pretenses" as defined by Maryland law, *see* Md. Ann. Code, Art. 27, § 140 (1976), over petitioner's contentions that the Fifth Amendment barred seizure of his personal business records and that warrants authorizing searches for documents in his offices were unconstitutionally general. The warrants at issue directed seizure of certain specified "items pertaining to sale, purchase, settlement and conveyance of lot 13, block T, Potomac Woods subdivision, Montgomery County, Maryland," 427 U.S. at 480 n. 10, "together with

other fruits, instrumentalities and evidence of crime at this [time] unknown." *Id.* As does the Church here, Andresen based his "generality" argument on the catch-all phrase at the conclusion of each warrant. He contended, according to the Court, that the "other-fruits" clause permitted the executing officers to search for and seize evidence of any crime.

After rejecting petitioner's Fifth Amendment claim, for reasons not germaine here, the Court began its Fourth Amendment analysis by reaffirming the rule that:

> General warrants, of course, are prohibited by the Fourth Amendment. "[T]he problem [posed by the general warrant] is not that of intrusion *per se*, but of a general, exploratory rummaging in a person's belongings. . . . [The Fourth Amendment addresses the problem] by requiring a 'particular description' of the things to be seized. *Coolidge v. New Hampshire*, 403 U.S. 443, 467 (1971). This requirement " 'makes general searches impossible and prevents the seizure of one thing under a warrant describing another. *As to what is to be taken, nothing is left to the discretion of the officer executing the warrant.*' " *Stanford v. Texas*, 379 U.S. 476, 485 (1965), quoting *Marron v. United States*, 275 U.S., at 196.

Andresen v. Maryland, supra, 427 U.S. at 480 (emphasis added). The Court then stated that, taken in context, the

> challenged phrase must be read as authorizing only the search for and seizure of evidence relating to 'the crime of false pretenses with respect to Lot 13T. . . .'

Id. (Citation omitted.) Since the warrants therefore "did not authorize the executing officers to conduct a search for evidence of *other* crimes," said the Court, they did not run afoul of the particularity requirement. *Id.* at 481-82 (Emphasis added.)

Petitioner in *Andresen* had a second Fourth Amendment claim, which pertained to documents referring to a lot other than 13T that were seized pursuant to a clause in the warrant authorizing search for "books, records, documents, papers, memoranda and correspondence, showing or tending to show a fraudulent intent, and/or knowledge as elements of the crime of false pretenses. . . ." Id. at 481 n. 10. Apparently he contended that these items were irrelevant to the charge concerning Lot 13T and therefore should have been suppressed according to *Warden v. Hayden, supra.* The Court disagreed, observing that intent to defraud is an element of the crime of false pretenses in Maryland and that it is well settled that "proof of similar acts is admissible to show intent or the absence of mistake." *Andresen, supra,* at 483. Moreover, said the Court,

> Lot 13T and the other lot [about which evidence was seized] had numerous features in common. Both were in the same section of the . . . subdivision; both had been owned by the same person; and transactions concerning both had been handled by petitioner. Most important was the fact that there were two deeds of trust in which both lots were listed as collateral.

Id. at 484.

III

The government apparently would have me read *Andresen,* in conjunction with *Warden v. Hayden,* as sanctioning any warrant that directs the executing officers to search for "evidence of" a particular crime. The logic of the government's position is clear and, I admit, parallels statements made by the Court in *Andresen:* If the affidavit and warrant together identify in precise

terms the crime believed to have been committed, and the warrant directs the agents to search for "evidence of" that crime, then the agents have no discretion to search for evidence of other crimes, and the particularity requirement is satisfied.

Were the government correct, the particularity requirement would be rendered a nullity. Hence I cannot believe that the Court intended *Andresen* to be interpreted so broadly, or so literally. For a warrant must satisfy *both* the probable cause and particularity commands, not simply the former: "[N]o Warrants shall issue, but upon probable cause [to believe a *particular* crime has been committed], . . . *and* particularly describing the place to be searched and the persons or things to be seized." U.S. Const. amend IV (emphasis added). To say that mechanical inclusion of the phrase "evidence of" in a warrant automatically and necessarily renders it particular rather than general is to say, simply, that we no longer prohibit general searches.

To be sure, searches for "evidence of" crimes are no longer prohibited, and in *Andresen* the Court did validate a warrant authorizing just that. This in no way means, however, that the particularity requirement has been discarded along with the "mere evidence" rule; rather, the government can safely assume only that searches for *particular evidence* will be condoned. As the Court put it in *Warden*,

> if . . . rejection [of the "mere evidence" rule] does enlarge the area of permissible searches, the intrusions are nevertheless made after fulfilling the probable cause *and particularity* requirements of the Fourth Amendment. . . .

387 U.S. 390 (emphasis added).

Andresen must, I believe, be read in the light of the Court's reiteration of our historical proscription of general warrants and the Court's statement, derived from numerous prior cases, that *"[a]s to what is to be taken, nothing is left to the discretion of the officer executing the warrant."* 427 U.S. at 480 (emphasis added). I do not take this statement literally to mean that the executing officer can make no determinations at all with respect to what is to be seized. Such an application of the Court's language would require me to ignore the rule permitting the executing officer to seize manifestly criminal objects such as contraband that he encounters inadvertently in plain view.[6] What I do take the Court to mean, however, is that a neutral and detached judicial officer must in the first instance ensure that strict standards exist to guide the officer in his exercise of discretion. Evidently the majority[7] of the Court was satisfied that the judicial officer who issued the warrant in *Andresen* could reasonably have concluded that a search for evidence pertaining to the sale of a specific parcel of real estate – precisely and unmistakably identified as "Lot 13T" – is sufficiently circumscribed to comport with the rule against discretionary searches and seizures. Presumably the agents could readily determine whether a particular document pertained to that lot simply by inspecting its contents in a cursory fashion – that is, by keying on the magic words, "Lot 13T." Thus they could instantly seize – or elimi-

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[6] *E.g., Alderman v. United States,* 394 U.S. 165, 177 n. 10 (1969) (dictum); *see also* Amsterdam, *supra* note 4, at 358.

Whether documentary evidence in a person's files can be encountered "inadvertently" is a question that is sure to arise. I would have grave apprehensions about such an application of the "plain view" doctrine.

[7] Justices Brennan and Marshall each wrote a dissenting opinion. 427 U.S. at 484; *id.* at 493.

nate from their scrutiny – any document that on its face did not relate to that property.[8]

Try as the government might; the same cannot be said about a search for evidence of a conspiracy – irrespective of the precision with which the underlying substantive offense is described.[9] Indeed, because of the permissive rules of evidence available to prosecutors seeking to prove conspiracy, in this context especially the distinction the government urges between impermissible searches for evidence of *any crime* and permissible searches for evidence of a *particular crime* is patently hollow. For there is nothing "particular" about conspiracy. As counsel for the Church points out, perhaps the best known statement in our jurisprudence concerning the law of conspiracy was that of Justice Jackson in *Krulewitch v. United States*, 336 U.S. 440 (1949):

> The modern crime of conspiracy is so vague that almost defies definition. Despite certain elementary and essential elements, it also, chameleon-like, takes on a special coloration from each of the many independent offenses on which it may be overlaid. It is always 'predominantly mental in composition' because it consists of a meeting of minds and an intent.

[8] I must admit that the Court's sanction of the seizure of evidence of "intent" or "absence of mistake" casts some doubt upon the issue involved here. However, the Court limited its sanction to evidence of similar transactions that related closely and objectively to Lot 13T, i.e., evidence pertaining to a second lot that was listed as collateral together with Lot 13T in two deeds of trust. 427 U.S. at 484. In so doing, the Court appeared to be embracing the rationale I have espoused in the text.

[9] In the present case, one of the underlying substantive offenses is obstruction of justice. That in itself is a rather amorphous crime, and remains so despite the detail with which the alleged plot is described in the affidavit.

> The crime comes down to us wrapped in vague but unpleasant connotations. It sounds historical undertones of treachery, secret plotting and violence on a scale that menaces social stability and the security of the state itself. . . .
>
> . . .
>
> [E]ven when appropriately invoked, the looseness and pliability of the doctrine present inherent dangers which should be in the background of judicial thought wherever it is sought to extend the doctrine to meet the exigencies of a particular case.

Id. at 446-47, 449. Inasmuch as conspiracy "almost defies definition," it is no surprise that the rules of evidence that pertain to it are loose and pliable as well. This is so principally because the underlying substantive offenses do not limit the scope of relevant evidence that might be introduced at trial. Rather, evidence of conspiracy could also include evidence of *any* action taken by one of the accused confederates – no matter how trivial or manifestly innocuous on its face – that might somehow be connected to an agreement to commit the substantive offenses, or be said to constitute an act in furtherance of such an agreement. *See, e.g.*, Wharton, *Criminal Evidence*, § 642 (13th ed. 1973). Thus "evidence of conspiracy" is a virtually open-ended proposition.

It seems self evident then, in considering both the warrant and the affidavit supporting it, *see Moore v. United States*, 461 F.2d 1236, 1238 (D.C. Cir. 1972), that the agents in this case had no clear standard to guide their exercise of discretion. Item 162 of the warrant authorized them to search for and seize "evidence at this time unknown" of the two conspiracies outlined in the affidavits. Such evidence, quite clearly, is of a character substantially different from the evidence involved in

Andresen. In that case, subjective judgments by the officers as to what may or may not be evidence were narrowly confined by the *objects* of the search – documents pertaining to the sale of a specific parcel of real estate, precisely identified as "Lot 13T." Thus a search for "unknown evidence" pertaining to a single real estate transaction may be said to be particular in the sense that the agents know essentially what they are looking for, and definite limitations exist with respect to their exercise of discretion as to what to seize. In the present case, by contrast, despite the detail with which the alleged conspiracies to burglarize government offices, steal government property, and obstruct the criminal investigation are described in the affidavit, the potential fruits of the search were limited only by the number of documents in the Church's files. To be sure, the affidavit provided the agents with substantial guidance as to what to look for. But neither the warrant nor the affidavit – nor both construed together – placed practical limitations upon their determinations respecting what to seize. For unless the contents of any particular document rendered it manifestly criminal, the decision whether to seize it was complicated by the subjective considerations attending the law of conspiracy. In effect, each agent had been delegated authority to consider the relevance of the documents according to his own subjective standards as to what evidences the conspiracies suggested by the affidavit. As a practical matter, therefore, a directive to seize "evidence at this time unknown" of conspiracy is a "wild card" permitting seizure of anything at all. In terms of the damage done to the Church's interest in freedom from unjustified, indiscriminate seizures, item 162 is indistinguishable from a warrant to seize evidence of "any crime."

Under the circumstances of this case, the government's argument that the affidavit was sufficient to establish the necessary particularity is on especially tenuous ground. For the government concedes that "certain documents... should not have been seized," that indeed "approximately half of the documents will be returned. . . ." Memorandum in Opposition To Motion For Return of Property at 4. Though, as the government suggests, the fact of improper *seizure* may not *ipso facto* demonstrate an improper *warrant,* that fact certainly provides strong indication that the agents themselves did not construe the affidavit as limiting their discretion.

Moreover, even assuming *arguendo* that the government's broad interpretation of *Andresen* is the correct one, I would still find it difficult to condone a warrant authorizing search for and seizure of evidence of conspiracy "at this time unknown." For unless the warrant directed the executing officers to seize *only evidence objectively pertaining to specific acts of conspiracy identified in the affidavit* – as distinguished from evidence of any potential act in furtherance of the conspiracies described – the officers would maintain their license to rummage through the files and take whatever they pleased. Indeed, even a warrant authorizing search only for unknown documents pertaining to specific acts of conspiracy would seem to suffer for want of particularity. Execution of such a warrant, again, would vest in the agents discretion to make difficult, subjective determinations with respect to relevancy. Thus I must admit that I have serious doubts whether any warrant authorizing search for and seizure of "documentary evidence of conspiracy at this time unknown" could withstand constitutional scrutiny.

IV

I recognize and share the Supreme Court's concern that the "complexity of an illegal scheme . . . not be used as a shield to avoid detection when the State has demonstrated probable cause to believe that a crime has been committed and probable cause to believe that evidence of this crime is in the suspect's possession." *Andresen, supra,* 427 U.S. at 481 n. 10. At the same time, of course, a complex legal scheme cannot be used as a shield from the commands of the Fourth Amendment. Thus it may be said that a far-flung criminal scheme – such as conspiracy – *justifies* an equally far-flung search for evidence of that scheme. The Fourth Amendment, however, as the Court has repeatedly recognized, commands more than a justification for an intrusion into a person's privacy. It also commands that no such intrusion be executed in an *arbitrary*, or indiscriminate manner. Thus steps must be taken to ensure that the intrusion is confined to its justifiable limits. This is so especially where searches for documents are involved.

> We recognize that there are grave dangers inherent in executing a warrant authorizing a search and seizure of a person's papers that are not necessarily present in executing a warrant to search for physical objects whose relevance is more easily ascertainable. . . . In both kinds of searches, responsible officials, including judicial officials, must take care to ensure that they are conducted in a manner that minimizes unwarranted intrusions upon privacy.

Andresen, 427 U.S. at 482 n. 11. This rationale, it seems to me, applies with still more force in a case involving a search through a religious organization's files.

Once government agents have a search warrant in hand, only the requirement that the warrant "particularly describ[e] the place to be searched, and the persons or things to be seized" serves to protect citizens from unjustified interferences with personal security or property. The particularity requirement – and nothing else – confines the intrusion to its justifiable limits.[10] In *Andresen* the Supreme Court evidently believed that the precision of the term "Lot 13T" was sufficient to accomplish that purpose. Here, however, there is no such precision. This is why the warrant cannot stand.

ORDER

Upon consideration of the foregoing assessment of the challenged process, the Court ORDERS that the government, forthwith:

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[10]Had the warrant authorized only seizure of items one through 161, for example, the resulting interference with the Church's privacy would have been narrowed considerably. First, the agents could have removed from the Church's files only the items listed specifically in the warrant. Second, specification of the things to be seized would have altered the search-process itself. Each of the specified items has certain objective, readily identifiable earmarkings – name of author or addressee, date, title and the like. Thus in one respect or another each item is similar to a document pertaining to "Lot 13T." Presumably the Church has imposed some system of order on its files, most likely by alphabetizing them. The agents, then, could first have looked in the specific sections of the files in which the documents would most likely be found. If perchance the agents succeeded immediately in locating the documents sought, no justification would have existed to search further, and no other documents could have been disturbed. Assuming the files had no order whatever or the specified items were randomly interspersed throughout them, the agents could have inspected each document in the files in cursory fashion, keying on the objective earmarkings specified in the warrant. Thus the agents would not have had authority to consider and take with them those secrets of the Church which should have been left alone.

(1) return to petitioner all material seized on July 8, 1977 in a search of its premises by agents of the Federal Bureau of Investigation under color of authority of a warrant dated July 4, 1977;

(2) destroy any and all copies of such materials in its possession or control and any and all fruits of the search and seizure, including but not limited to notes, memoranda, correspondence, photographs or other materials seized or any information otherwise gleaned during or as a result of the search;

(3) retrieve any copies of any materials seized or any fruits of the search and seizure which have been disseminated to any persons outside the Fraud Section of the United States Attorney's Office, including any copies of such items or notes or memoranda concerning them made by such persons;

(4) destroy all materials retrieved pursuant to paragraph (3) of this order without making copies thereof or notes concerning them; and

(5) report in detail in writing to this Court, with copy to counsel for petitioner, on its compliance with the terms of this order not later than one week from the date hereof.

And it is further ORDERED
that execution of the above is stayed pending final resolution of this matter if the government elects to appeal; otherwise its terms shall be effected automatically upon expiration of the time allotted for filing notice of appeal. In the interim the documents shall be impounded by the Clerk.

/s/ William B. Bryant
Chief Judge

July 27, 1977
Date

APPENDIX F

[Filed Jan 4, 1978]

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 77-1793 Misc. No. 77-0151

September Term, 1977

IN RE:

SEARCH WARRANT DATED July 4, 1977,
for Premises at 2125 S Street, Northwest
Washington, D.C.

BEFORE: MacKinnon and Robb, Circuit Judges;
and Markey*, Chief Judge, U.S. Court of
Customs and Patent Appeals.

ORDER

Upon consideration of the petition for rehearing filed by appellee Founding Church of Scientology, it is

ORDERED by the Court that appellee's aforesaid petition is denied.

Per Curiam

For the Court:

/s/George A. Fisher
GEORGE A. FISHER
Clerk

*Sitting by designation pursuant to Title 28, U.S.C. §293(a).

APPENDIX G

[Filed Jan 9, 1978]

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 77-1793

September Term, 1977

Miscellaneous #77-0151

IN RE:

SEARCH WARRANT DATED July 4, 1977,
for Premises at 2125 S Street, Northwest
Washington, D.C.

BEFORE: MacKinnon and Robb, Circuit Judges;
and Markey*, Chief Judge, U.S. Court
of Customs and Patent Appeals.

ORDER

Upon consideration of the motion of the Founding Church of Scientology to recall the mandate and thereafter to stay its reissuance, filed December 12, 1977, of the government's opposition to said motion and of movant's reply thereto, and upon consideration of the government's motion for immediate reissuance of the

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*Sitting by designation pursuant to Title 28 U.S.C. §293(a).

mandate, filed December 16, 1977, and of the opposition of the Founding Church of Scientology to said motion, and the mandate having been returned to this Court on December 12, 1977, it is

ORDERED by the Court that the motion of the Founding Church of Scientology is granted to the extent that the Clerk is directed not to reissue the mandate in this case prior to February 13, 1978, and it is

FURTHER ORDERED by the Court that the motion of the government for immediate reissuance of the mandate is denied.

Per Curiam

For the Court:

/s/George A. Fisher
GEORGE A. FISHER
Clerk